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91-1951

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS G. BASSLER, TEMPORARY ADMINISTRATOR
OF THE ESTATE OF
APOLINAR "PAUL" BENAVIDES, DECEASED
And
STELLA BENAVIDES,

Petitioners

VS.

COUNTY OF WILSON
And
MARVIN H. BAUMANN, SHERIFF
INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

I. WHETHER GOVERNMENTAL UNITS AND THEIR POLICYMAKERS SHOULD BE ACCOUNTABLE FOR THEIR FIRST EGREGIOUS CONSTITUTIONAL VIOLATION WHICH DEPRIVES A PERSON OF LIFE.

II. WHETHER THE FIFTH CIRCUIT ERRED IN FINDING THAT ALTHOUGH A JURY COULD REASONABLY CONCLUDE THAT PAUL BENAVIDES WAS PURPOSELY INJURED AND PURPOSELY ALLOWED TO SUFFER BY DEPUTIES (WHO HAD DOCUMENTED VIOLENT PROPENSITIES) NO JURY COULD REASONABLY CONCLUDE THAT THERE WAS DELIBERATE INDIFFERENCE.

II.

PARTIES BELOW

Petitioners, Apolinar "Paul" Benavides[1] and Stella Benavides, were Appellants and Respondents, County of Wilson and Marvin H. Baumann, Sheriff, in his individual and official capacities, were Appellees.

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[1] Apolinar "Paul" Benavides died while the appeal before the Fifth Circuit was pending. The County Court sitting in matters probate and exercising jurisdiction over the Estate of Apolinar "Paul" Benavides has appointed Thomas G. Bassler as Temporary Administrator of the Estate of Apolinar "Paul" Benavides.

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REASON FOR GRANTING WRIT

This Court should grant certiorari and reverse the Fifth Circuit Court of Appeals because its opinion which exonerates governmental units and their policymakers from liability for their first violation of a person's constitutionally protected rights, regardless of how egregious, conflicts with applicable decisions of this Court. Furthermore, the present public concern regarding this issue has never been of greater magnitude.

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NO. _____

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OCTOBER TERM, 1991

THOMAS G. BASSLER, TEMPORARY ADMINISTRATOR
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Petitioners

VS.

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MARVIN H. BAUMANN, SHERIFF
INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY,
Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioners, Thomas G. Bassler and Stella Benavides, petition this Honorable Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

V.

OPINIONS BELOW

On February 1, 1991, the United States District Court for the Western District of Texas, at San Antonio, made findings of fact and conclusions of law (Appendix pp. A38-A59). In accordance therewith, the District Court entered an Order granting Defendants' Motions for Summary Judgment (Appendix pp. A36-A37) and a take nothing Judgment (Appendix pp. A34-A35). The opinion is not published.

On appeal, the Fifth Circuit Court of Appeals affirmed (Appendix pp. A1-A33), 955 F. 2d 968 (5th Cir. 1992).

VI.

STATEMENT OF JURISDICTION

On March 5, 1992, the Fifth Circuit Court of Appeals affirmed the District Court's

Summary Judgment entered on February 1, 1991. The statutory provision which confers jurisdiction upon this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

VII.

STATEMENT OF THE CASE

On April 29, 1989, Paul Benavides, a 47 year old hispanic man, was arrested for public intoxication in the City of Floresville, Wilson County, Texas. Since Floresville had no jail of its own, Paul Benavides was transported to the Wilson County jail. Upon arrival at the jail, shortly before midnight, the Wilson County Sheriff's Department placed Paul Benavides in an isolation cell.

Although disputed, there was overwhelming evidence that Deputy Blocker of the Wilson

County Sheriff's Department snuck into Paul Benavides' cell and violently attacked him fracturing his neck and crushing his spinal cord. Such evidence included the testimony of two Floresville police officers that Deputy Blocker bragged to them about his conquest.

Throughout the night and the entire following day, Paul Benavides was paralyzed, moaned in severe pain and repeatedly begged for medical attention. As the hours passed, the odor from his urine and feces, in which he was laying paralyzed, could be smelled throughout the jail. All three deputies, on duty during the next 18 hours, admitted they saw his deteriorating condition and heard his complaints. Despite the obvious indications of a medical emergency, his repeated pleas for help were ignored.

Finally, 18 hours later, an ambulance was called at the insistence of a family member.

He was diagnosed with a fractured neck and a crushed spinal cord which rendered him a quadriplegic. Two years later, Paul Benavides died from complications associated with his quadriplegia.

The only three deputies on duty at the Wilson County jail during the 18 hours Paul Benavides was allowed to suffer were Deputies Blocker, Urbanczyk and Schwertlech.

Sheriff Baumann hired each of these deputies to serve as jailers. Deputy Urbanczyk was not a certified or trained jailer. Once certified as peace officers by the State, none of the deputies ever received any medical or other training from Sheriff Baumann or Wilson County.

Deputy Schwertlech, before and while employed by Wilson County, had to be admitted to psychiatric hospitals on three separate occasions. He was diagnosed as a manic

depressive, suicidal and a severe alcoholic. He necessitated Lithium. Despite the fact that he was a severe alcoholic and was on Lithium, he continued to drink.

Deputy Urbanczyk also had a history of alcohol abuse and severe bouts of depression that had necessitated hospitalized treatment; had a long history of threatening to attempt suicide; had attempted suicide; had been diagnosed as homicidal and had a history of violent behavior.

Deputy Blocker had no medical training whatsoever. He claimed that he was not even capable of determining if a person had a broken neck, an injured spinal cord or a fractured skull.

Sheriff Baumann never disciplined any of his deputies to any degree for their conduct.

The basis for federal jurisdiction before the United States District Court was 28 U.S.C.

§ 1343 and its pendant jurisdiction over claims under Texas law. The recovery of damages was authorized by 42 U.S.C. § 1983 and § 1988. The Fifth Circuit Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

VIII.

ARGUMENT AND AUTHORITIES

I. WHETHER GOVERNMENTAL UNITS AND THEIR POLICYMAKERS SHOULD BE ACCOUNTABLE FOR THEIR FIRST EGREGIOUS CONSTITUTIONAL VIOLATION WHICH DEPRIVES A PERSON OF LIFE.

Paul Benavides was brutally attacked with such force that his neck was broken and his spinal cord crushed. He was rendered a quadriplegic. Then, his repeated pleas for

medical attention while paralyzed, laying in his own urine and feces and suffering, were ignored for 18 hours.

The Fifth Circuit's opinion exonerates Wilson County and its sheriff from liability for two apparent reasons, to-wit: 1) this was the first time they violated a person's constitutional rights; and 2) the evidence of deliberate indifference was insufficient to establish a custom, policy or practice.

Although the District Court and Fifth Circuit correctly found that there was no evidence of prior deliberate indifference, by the deputies involved, such is not the standard, established by this Court, to impose liability upon a governmental unit.

A. NO IMMUNITY EXISTS FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS

The Eighth Amendment, which prohibits the infliction of cruel and unusual punishment, applies to the States through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

A governmental unit has no immunity from liability under 42 U.S.C. § 1983 for violating a person's constitutional rights. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); Owen v. City of Independence, Mo., 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).

Deliberate indifference to an inmate's serious medical needs constitutes cruel and unusual punishment under the Eighth Amendment and gives rise to a § 1983 cause of action.

Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). However, this Court has stated that "unnecessary and wanton infliction of pain" is necessary to prove a sufficiently culpable state of mind to implicate the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859 (1976); Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); Wilson v. Seiter, 501 U. S. _____, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

Contrary to findings in Gregg v. Georgia and Estelle v. Gamble that "deliberate" indifference was not established because of a lack of culpability, the Fifth Circuit in this case found:

> "A jury could reasonably conclude Wilson County jail employees either

> struck Benavides with force sufficient to break his back or later ignored his pleas for medical help. That is, a jury could reasonably conclude that the three Wilson County deputies purposely denied Benavides due process of law and his right to be free from cruel and unusual punishment under the eighth amendment (emphasis added)."

955 F. 2d at 972 (Appendix pp.A11-A12). Thus, there was evidence that the infliction of pain upon Paul Benavides was wanton or otherwise the result of a sufficiently culpable state of mind.

B. A SINGLE DECISION MAY ESTABLISH LIABILITY

This Court, in achieving the purposes of the Civil Rights Act, has held that under appropriate circumstances a single decision by a policymaker may be indicative of a policy or practice which supports § 1983 governmental liability. Pembaur v. Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298, 89 L. Ed. 2d 452 (1986).

In Pembaur a prosecutor instructed deputies to force entry into a medical clinic to serve process on witnesses. The District Court dismissed the complaint and the Sixth Circuit affirmed because Appellant had simply shown evidence of a single incident and failed to establish the existence of a county policy. This Court reversed and remanded holding that

the single decision by the prosecutor could create § 1983 liability for the municipality.

In City of Oklahoma v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) this Court held that in order for a single incident of unconstitutional conduct to give rise to municipal liability, a causal connection must be shown between the single incident and a single policy decision by policymakers.

Justice Brennan, in a concurring opinion, joined by Justice Marshall and Justice Blackmun, addressed the question herenow presented to this Court, when he stated:

> "If the city's argument here depended on the premise that municipal conduct that resulted in only a single incident was immune from liability, I

would have to agree with respondent (Tuttle) that Monell and Owen provide authority to the contrary. A rule that the city should be entitled to it's first constitutional violation without incurring liability - - even where the first incident was the taking of the life of an innocent citizen - - would be a legal anomaly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom that

> would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur." Id. at 809 - 10.

Clearly, the Tuttle case is distinguishable from this case because the single constitutional violation in Tuttle was committed by an individual "policeman" who was not a "policymaker" whereas, in this case, there is evidence that the constitutional

violations occurred because of the custom, practice or policy of Sheriff Baumann, the "policymaker", of inadequate hiring, retaining, training and supervising.

The undisputed facts and circumstances pertaining to the sheriff's hiring, retaining, training and supervising of the three deputies involved in this occurrence create appropriate circumstances to establish the county's § 1983 liability. At the very least, a jury should have been permitted to weigh the probative value of the evidence.

The Fifth Circuit's opinion in this case renders the county and sheriff immune from liability for the sheriff's decisions in hiring and retaining and failing to train and supervise deputies.

C. PUBLIC POLICY AND PRINCIPLES OF FUNDAMENTAL HUMAN RIGHTS MANDATE A REVERSAL

The purposes of the Civil Rights Act are three-fold: 1) to provide protection to persons wronged by the abuse of governmental authority; 2) to deter future constitutional violations; and 3) to establish public policy. Owen v. City of Independence, Mo., 445 U.S. at 650, 100 S. Ct. at 1415, 63 L. Ed. 2d 673 (1980).

The Fifth Circuit's opinion in this case wholly fails to achieve any of the purposes of the Civil Rights Act. In fact, if permitted to be a precedent, such opinion will encourage policymakers to exercise unbridled authority and discretion in their decisions regarding hiring, retaining, training and supervising.

II. **WHETHER THE FIFTH CIRCUIT ERRED IN FINDING THAT ALTHOUGH A JURY COULD REASONABLY CONCLUDE THAT PAUL BENAVIDES WAS PURPOSELY INJURED AND PURPOSELY ALLOWED TO SUFFER BY DEPUTIES (WHO HAD DOCUMENTED VIOLENT PROPENSITIES) NO JURY COULD REASONABLY CONCLUDE THAT THERE WAS DELIBERATE INDIFFERENCE.**

Deliberate indifference may be shown by proving a policy or practice of deficiencies of staffing or procedures. Anderson v. City of Atlanta, 778 F. 2d 678 (11th Cir. 1985). Further, failing to adequately train employees may render a governmental unit liable for deliberate indifference. City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

A. FIFTH CIRCUIT FOUND SOME EVIDENCE OF A PRACTICE OF HIRING OR RETAINING UNFIT DEPUTIES

The Fifth Circuit acknowledged that there was at least some evidence of hiring unfit deputies. The Court found evidence, although "thin", "...from which a jury might infer that the Wilson County jail employees were unfit for service at the time that they were hired...". 955 F. 2d at 974 (1991) (Appendix p. A25). Furthermore, the Court found: "There was evidence from which a jury could reasonably conclude that Schwertlech and Urbanczyk both had suffered from psychological disorders before the incident." 955 F. 2d at 971 (1991) (Appendix p. A7).

Prior to this occurrence, Deputy Schwertlech had been in and out of psychiatric hospitals because of his manic depressive

disorder, suicidal depression and very severe alcoholism. Deputy Urbanczyk, also necessitated psychiatric hospitalization because he was severely depressed, suicidal, homicidal, an alcoholic and had displayed violent propensities. Deputy Urbanczyk was not a certified jailer and none of the deputies were ever provided any medical or other training by Wilson County or Sheriff Baumann.

B. FIFTH CIRCUIT'S FINDING THAT DEPUTIES WERE CURED BEFORE THIS OCCURRENCE WAS ERRONEOUS

The Fifth Circuit, in holding that the sheriff and county were not deliberately indifferent in hiring, retaining, training or supervising their deputies, made two significant erroneous findings. First, the

Court found Sheriff Baumann had medical reports that stated that Deputy Urbanczyk was cured of suicidal ideation, had stopped drinking and could return to work without restriction. These reports were written three (3) months after Paul Benavides was beaten and allowed to suffer. Deputy Urbanczyk had not been cured or even treated before this occurrence. Another erroneous finding was that Deputy Schwertlech was cured and remained compliant with his treatment plan. Deputy Schwertlech, admitted he continued to drink alcohol although he was a very severe alcoholic, his psychiatrist strongly admonished him not to drink, and he was ordered to remain on Lithium. There was evidence in a psychiatric report that every member of the sheriff's staff, except one, drinks alcohol while on duty. Deputy Schwertlech's alcoholism and suicidal

depression was obviously not "cured" - he necessitated readmission to psychiatric hospitals for prolonged periods on two more occasions.

C. THE DISTRICT COURT AND FIFTH CIRCUIT INVADED THE PROVINCE OF THE JURY IN RESOLVING DISPUTED FACTS

The material facts in this cause were disputed. Nevertheless, the District Court and Fifth Circuit, contrary to law, weighed the probative value of the evidence and, thus, invaded the province of the jury.

In deciding a motion for summary judgment, the District Court is required to view the evidence in the light most favorable to the non-movants and resolve all doubts against movants. Cubbage v. Averett, 626 F.

2d 1307, 1308 (5th Cir. 1980); Joplin v. Bias, 631 F. 2d 1235, 1237 (5th Cir. 1980).

The District Court is prohibited from resolving material factual disputes. Environmental Defense Fund v. Marsh, 651 F. 2d 983, 991 (5th Cir. 1981). The District Court is further prohibited from assessing the probative value of the evidence. United States v. An Article of Food Consisting of 345/50lb. bags, 622 F. 2d 768, 773 (5th Cir. 1980).

If the Fifth Circuit had required the District Court to view the evidence in the light most favorable to Paul and Stella Benavides and to resolve all doubts against Wilson County and Sheriff Baumann, then the summary judgment would have been reversed.

IX.
CONCLUSION

Paul Benavides was deprived of this Eighth Amendment right to be free from cruel and unusual punishment when he was purposely brutally beaten and purposely allowed to suffer for over 18 hours. In seeking redress for this egregious wrong, he was deprived of a trial by jury.

A jury could have reasonably concluded that the county sheriff's decisions to hire, retain and fail to train or supervise, not one deputy but, rather, all three deputies who came into contact with Paul Benavides, amounted to deliberate indifference.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5557

APOLINAR "PAUL" BENAVIDES and
STELLA G. BENAVIDES,
Plaintiffs-Appellants,

COUNTY OF WILSON and MARVIN H. BAUMANN,
Sheriff, Individually and in his
official capacity,
Defendants-Appellees.

Appeal From the United States District Court
for the Western District of Texas

(March 5, 1992)

Before WISDOM, HIGGINBOTHAM, and SMITH,
Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Apolinar[1] and his wife Stella Benavides brought this § 1983 action against Wilson County and Marvin Baumann, its Sheriff, alleging that both the County and the Sheriff maintained policies that failed adequately to hire, train, and supervise jail personnel. The Benavideses allege that the police seriously injured Apolinar while he was jailed. Stella Benavides also brought pendent state-law claims for loss of consortium and negligent infliction of emotional distress. The district court granted summary judgment to Wilson County, finding that Apolinar Benavides had alleged insufficient evidence that County policy or custom caused his injury. The district court also granted summary judgment

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[1]Apolinar Benavides died while this appeal was pending.

for the defendants on Stella Benavides' claims.

We are persuaded that Benavides produced sufficient evidence in response to the motion for summary judgment to create a fact issue as to whether he was injured by the unreasonable force of the deputies. He failed, however, to raise a fact issue as to whether the County was deliberately indifferent in its hiring and training of the deputies. We also find the evidence insufficient to avoid summary judgment on Stella Benavides' state-law claims.

The Benavideses also contend that the district court erred in failing to rule on several procedural and evidentiary motions before ruling on the defendants' motion for summary judgment, but do not explain how the district court's failure to rule on these

motions prejudiced them. We find that the district court's failure to address these motions, most of which were untimely filed, was, at worst, harmless error. Therefore, we affirm the district court's grant of summary judgment.

I.

On Saturday, April 29, 1989, a Floresville police officer arrested Apolinar Benavides for public intoxication. According to the police he was drunk and belligerent and they placed him in an isolation cell in the Wilson County jail. A jailer, John Blocker testified that Benavides shouted and banged his head and shoulder on the cell door. Benavides testified that Blocker pushed or hit him causing him to fall and hit his head. It was undisputed that while jailed, Benavides

suffered a fractured spinal column that rendered him a permanent quadriplegic.

Benavides testified that both Deputy Blocker and Deputy Urbanczyk checked on him in his cell during the night and that Benavides told them that he could not move and wished to go to the hospital. Neither deputy, however, provided any medical assistance beyond placing Benavides back on his bunk.

On Sunday morning, April 30, 1991, (sic 1989) at about 7:00 a.m., Blocker reported Benavides' complaints to the Jail Administrator Schwertlech. Schwertlech went to the cell and looked at Benavides, but he did not call a doctor because he believed that Benavides was "faking it."

According to Benavides' testimony, this was the pattern on Sunday. Urbanczyk or Schwertlech would check Benavides as he lay in

his cell. Benavides would then complain that he was paralyzed and request hospitalization, but he was unable to persuade any deputy, and they left him lying in his cell. Unable to get up, he lay in his own urine.

Wilson County Sheriff Marvin Baumann was not present at the jail when Benavides was first arrested on Saturday, but he visited the jail briefly Sunday afternoon. Schwertlech told Baumann that an inmate would probably have to be taken to the State hospital. According to Baumann, Schwertlech did not identify the inmate or describe his complaints. Schwertlech remained on duty until 7:00 p.m., but never called an ambulance.

On Sunday evening, around 8:00 p.m., Blocker, again on night shift, telephoned Baumann and told him that Benavides' wife was

at the jail to pick him up but he would not get up. By this time, Benavides had been paralyzed for 18 hours and had defecated on himself. Baumann instructed Blocker to call an ambulance for Benavides. The ambulance which arrived at 8:10 p.m. was the first furnished medical assistance.

Sheriff Baumann requested an investigation by the Texas Rangers into Benavides' injury. The Ranger investigation concluded that Benavides' injury was self-inflicted and that there was no mistreatment or misconduct by jail personnel. Sheriff Baumann took no disciplinary action against any employee.

There was evidence from which a jury could reasonably conclude that Schwertlech and Urbanczyk both had suffered from psychological disorders before the accident. Both had been

hospitalized for depression and alcoholism and Schwertlech was being treated with Lithium. Urbanczyk had attempted suicide and had suicidal thoughts before treatment, but according to his medical report, these suicidal tendencies had been cured when he was discharged from the hospital. Both Urbanczyk and Schwertlech had received "fit to work" letters from various doctors. Sheriff Baumann testified that he relied on these letters in hiring the two deputies.

A peace officer, John Sexton, testified as an expert witness for Benavides that Wilson County failed to hire, supervise, and train its jailers and peace officers in accordance with national and state standards. The district court found that Sexton provided no reasoning or factual basis for his conclusions and that Benavides never presented Sexton's

qualifications as an expert. While not explicitly finding that Sexton's testimony was inadmissible as expert testimony, the district court implicitly did so, concluding that it was "insufficient to raise a fact issue as to [the] existence of an unconstitutional policy or custom." Benavides also pointed out that none of the three employees had received any special medical training outside of the training that all certified jailers and peace officers must receive under Texas law. Benavides also produced an autopsy report describing the death in 1986 of an inmate from head injuries suffered while jailed in Wilson County. According to the autopsy report he probably died as a result of a fall suffered while under the influence of correction fluid.

Baumann and Wilson County presented the following undisputed evidence of adequate

training and hiring policies. First, Baumann relied on the state certification of his staff as peace officers and as jailers to insure that the staff would be properly trained. Blocker, Schwertlech, and Urbanczyk were all certified peace officers and had therefore completed at least 320 hours of instruction, including an unspecified number of hours of instruction in the use of force and emergency medical care. All three were also reserve deputies and had therefore received ten hours of additional first aid training and C.P.R. instruction. As licensed jailers, Blocker and Schwertlech had received at least 36 hours of instruction, including a course on evaluating the physical condition of prisoners.

Baumann stated that his normal hiring procedure was to interview personally all prospective employees and to check all

applicants for any prior criminal record. He telephoned previous employers to inquire about job applicants, and he checked prospective employees' credit history. Finally, Baumann testified that, to be licensed for the position of peace officer, the applicant must meet certain minimum educational requirements and have a psychological and physical examination. Baumann conceded that, apart from on-the-job training, the County did not provide any training over and above what the state of Texas requires for jailer and peace officer certification.

II.

For the purposes of summary judgment, we resolve all factual issues in favor of Benavides. A jury could reasonably conclude Wilson County jail employees either struck Benavides with force sufficient to break his

back or later ignored his pleas for medical help. That is, a jury could reasonably conclude that the three Wilson County deputies purposely denied Benavides due process of law and his right to be free from cruel and unusual punishment under the eighth amendment. See Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991).

Benavides, however, sues Wilson County and Sheriff Baumann, not the three deputies. In a § 1983 action, a municipality may not be held strictly liable for the acts of its non-policy-making employees under a respondeat superior theory. Oklahoma City v. Tuttle, 471 U.S. 808, 817-18 (1985); Monell v. Dept. of Social Services, 436 U.S. 658, 691 (1978). Under certain circumstances, however, a municipality may incur § 1983 liability for its employees' acts when a municipal policy of

hiring or training causes those acts. In order to prove that a municipal hiring or training policy violated his rights under § 1983, Benavides must show that (1) the training or hiring procedures[2] of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury. City of Canton, 109 S. Ct. 1205-07 (1989).

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[2] Benavides also refers to Baumann's failure to supervise adequately, but does not point to any evidence of inadequate supervision different from evidence of inadequate hiring and training. Therefore, we treat the allegations of inadequate supervision simply as repetitions of the allegations of inadequate hiring and training.

A municipality acts with "deliberate indifference" in adopting an otherwise constitutional policy if

> "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."

City of Canton, 109 S. Ct. at 1205. See also Wassum v. City of Bellaire, Texas, 861 F. 2d 453, 456 (5th Cir. 1988) (plaintiff must show that hiring practice constituted "gross negligence amounting to conscious indifference to the welfare of the public").

Benavides argues that the hiring and training policies were inadequate in the three specific ways (1) Baumann failed to provide medical training to Blocker, Schwertlech, and Urbanczyk; (2) Baumann hired Schwertlech and Urbanczyk, despite their history of mental disorders and alcoholism; (3) Baumann failed to obtain Schwertlech's medical records, consult with the employees' doctors, or inquire into the specific mental disorders suffered by the three employees.[3]

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[3] Benavides contends that the autopsy report of John Talley, who died of injuries sustained while confined in Wilson County jail, constitutes evidence of the jail staff's past deliberate indifference to inmates' medical needs. However, the autopsy report indicates only that Talley slipped, fell, and injured himself while in jail and died four days later. Nothing in the report indicates that the jail staff failed to summon medical attention promptly. Benavides' motion to supplement the record contained allegations that Blocker was involved in an incident in which he engaged in violent and abusive" behavior. The motion requested leave to add eight fact witnesses

A.

Benavides contends that Baumann provided inadequate medical training for his deputies which amounted to deliberate indifference to arrestees' constitutional rights and that this failure to train caused the deputies to provide constitutionally inadequate medical care to Benavides. We find no evidence that the alleged inadequacies in the deputies' medical training were "so obvious... and likely to result in violations of constitutional rights" that Sheriff Baumann can be said to have been deliberately

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to Benavides' interrogatory answers who would testify about this incident. However, there is no affidavit or deposition from these witnesses in the record. Lacking any record evidence of the incident, we cannot consider it in reviewing the district court's summary judgment order. See Davis v. City of Ellensburg, 869 F. 2d 1230, 1234 (9th Cir. 1989).

indifferent to such rights in adopting his training policy.

An adequate training program must "enable officers to respond properly to the usual and recurring situations with which they must deal." City of Canton, 109 S. Ct. at 1205. It is undisputed that Blocker and Schwertlech were certified jailers and that Urbanczyk was a certified peace officer at the time of Benavides' injury. Texas law requires that these officers receive at least 10 hours of basic medical training for certification. Benavides has produced no evidence suggesting that the deputies received less than the basic medical training required by Texas law. Benavides must show, therefore, that this legal minimum of training was inadequate to enable the deputies to deal with "usual and

recurring situations" faced by jailers and peace officers.

Benavides produced no evidence that the deputies' medical training was inadequate. There was no record evidence of either the content of national or state standards for peace officers or jailers or of prior incidents at the Wilson County Jail that might indicate a need for more medical training of deputies. Indeed, Benavides never described the training that the deputies allegedly lacked that was necessary for adequate job performance.

As for Sexton's deposition testimony, the district court was well within its discretion in finding the deposition inadmissible as expert testimony. Sexton's statements relevant to Benavides' assertions of a deliberately indifferent policy or custom are

only assertions that the training, employment screening, and supervision of Wilson County employees did not meet minimum standards.[4] Sexton's expert qualifications were never presented to the Court.[5] Moreover, as the

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[4]Sexton states that (1) he does not "believe [that Baumann performed] a professional investigative background [check] on these people [sufficient] to hire them as full-time jail officers or full-time peace officers"; (2) "if the...jail officers were supervised...the supervisor would've seen the inadequacy of the officer and supervised him right, [and] this [unconstitutional treatment] may not have occurred"; (3) Baumann "failed to hire, screen, train, investigate and supervise its officers and jailers in accordance with acceptable state and national standards" including the "Texas Jail Commission [standards)"; and (4) the "believe[s] [that] if [the employees] were trained with other training they would've recognized the needs of this inmate by some method of finding out what was wrong with him."

[5] Benavides contends that the district court never ruled on the admissibility of this evidence. However, the district court's finding that Sexton's qualifications were never presented and that his statements lacked any apparent factual basis necessarily lead to the conclusion that Sexton's testimony in the

district court noted, Sexton never described the content of the standards to which he referred or explained how the deputies' training failed to meet those standards.

"Without more than credentials and a subjective opinion, an expert's opinion that 'it is so' is not admissible." Viterbo v. Dow Chemical Co., 826 F. 2d 420, 424 (5th Cir. 1987). In this case, Benavides never supplied Sexton's credentials and Sexton's assertions were only his "subjective opinion," unrooted in factual foundation or proven expertise. Sexton asserted that the deputies' training fell short of state and national standards, yet never described the specific shortfall. His testimony was "pure speculation" and therefore inadmissible. Washington v.

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deposition excerpts was inadmissible. Christophersen v. Allied-Signal Corp., 939 F. 2d 1106, 1110 (5th Cir. 1991) (en banc).

Armstrong World Industries, Inc., 839 F. 2d 1121, 1124 (5th Cir. 1988).

Absent Sexton's deposition excerpts, Benavides had nothing but his own allegations to establish that the deputies' training was so obviously inadequate that the County was deliberately indifferent in not improving it. But "conclusory allegations of...'grossly inadequate training'" do not make out a case of a deliberately indifferent policy. Rodriguez v. Avita, 871 F. 2d 552, 555 (5th Cir.), cert. denied, 493 U.S. 854 (1989). Without producing any evidence, Benavides invites a per se rule that a county is deliberately indifferent to its jailers' and peace officers training whenever it relies exclusively on state certification requirements to ensure that its deputies are adequately trained. We are pointed to nothing

supporting such a blanket proposition. Cf. D.T. by M.T. v. Indep. School Dist. No. 16, 894 F. 2d 1176, 1179, 1193-94 (10th Cir.), cert. denied, 111 S. Ct. 213 (1990) (municipality not deliberately indifferent when policymaker relied on state certification to insure that teacher lacked criminal record).

B.

Benavides also alleges that Baumann's deliberately indifferent policy of inadequate screening of prospective employees led him to hire unfit jailers and deputies whose unfitness caused them injury. The basis for Benavides' contention of a deliberately indifferent hiring policy is Baumann's decision to retain two employees, Urbanczyk and Schwertlech, who suffered from suicidal depression and alcoholism with a history of

hospitalization for their treatment. As we noted, allegations about a prior act of violence by Blocker are unsupported by record evidence. Therefore, Benavides' factually supported contentions are that Baumann was deliberately indifferent in failing to examine the medical histories of Schwertlech and Urbanczyk more carefully.

Baumann relied on letters from physicians stating that both employees were fit to work. Schwertlech's physician wrote a letter stating that Schwertlech "is able to resume his activities prior to hospitalization" as long as Schwertlech "remain[ed] compliant with the prescribed treatment plan." He also stated that he had "faith in Mr. Schwertlech that he will remain compliant with his treatment." Urbanczyk's doctor signed a form provided by the Texas Commission on Law Enforcement

Officer Standards and Education stating that Urbanczyk was in satisfactory medical and psychological condition. Another doctor signed a letter stating that Urbanczyk could now return to work without any restrictions."

There is no evidence that Baumann would have discovered anything that would have induced him to dismiss the deputies if he had spoken to the doctors in more detail about the deputies' hospitalization. The reports stated that Urbanczyk was cured of suicidal ideation and had stopped drinking upon his discharge from the hospital. Schwertlech's report states that he, too, had a drinking problem and suffered from depression before treatment, but that he was fit for work as long as he took his medication.

Baumann also could not have inferred that Schwertlech and Urbanczyk were unfit to work

from their job performance. There is no evidence that Schwertlech's and Urbanczyk's mental disorders interfered with their work, even before they were treated. The "patient history" attached to Urbanczyk's psychiatric records states that "does his job very well...and is liked by the public." The report also stated that, unlike some other members of the sheriff's staff, Urbanczyk never drank while on duty. Likewise, Benavides never alleges that either Urbanczyk or Schwertlech had ever been negligent in the performance of his duties before the Sunday incident.

In short, evidence from which a jury might infer that the Wilson County jail employees were unfit for service at the time that they were hired is thin indeed. The fact that Baumann failed to research Schwertlech's

and Urbanczyk's medical histories does not indicate that Baumann was deliberately indifferent in hiring or retaining such people to work as jailers and deputies. Stokes v. Bullins, 844 F. 2d 269 (5th Cir. 1988) is instructive. In Stokes, the municipality hired an individual without discovering his history or fifteen arrests for offenses ranging from assault to armed robbery. The municipality did not request a National Crime Information Center Check which would have disclosed his criminal history. The officer later shot and permanently disabled a driver who owed a traffic fine, apparently because the driver had been impertinent.

The Stokes court affirmed the district court's grant of summary judgment to the defendant. The court held that the town's investigation of the applicant's prior

employment history and their investigation of recent arrests of the officer for relatively trivial offenses sufficed to show that the town was not deliberately indifferent in hiring the officer. In justifying this result, the Stokes court stated that it declined to make performance of a NCIC check a constitutional requirement. Id. at 275. The town's good faith hiring effort was adequately demonstrated by its review of the applicant's employment history and its review of those arrests that were brought to its attention.

Under Stokes, the evidence here raises no fact-issue of deliberate indifference based upon Baumann's failure to conduct further investigations of his deputies. We declined to impose a constitutional requirement of further investigation in Stokes when the

municipality's hiring was based on good-faith investigation of the applicant's known arrest record. Likewise, we cannot see how it should have been obvious to Baumann that further investigation was needed after obtaining fit-to-work letters from physicians giving him reasonable assurance of the deputies' mental health. See Graham v. Sauk Prairie Police Comm'n, 915 F. 2d 1085 (7th Cir. 1990) (police chief is not deliberately indifferent to mental competence of police officer when he relies on physician's letter certifying that officer was fit for work).

Benavides brings this § 1983 action against Sheriff Baumann in Baumann's individual capacity as well as in Baumann's official capacity as sheriff. There is no genuine issue of fact as to whether Baumann was deliberately indifferent to arrestees'

constitutional rights in hiring or training. Because Benavides suggests no other basis for Baumann's individual liability, we affirm the district court's order of summary judgment in Benavides' action against Baumann individually as well as in Benavides' action against Wilson County.

III.

Stella Benavides contends that the district court erred in granting summary judgment on her state-law claims. We disagree. Mrs. Benavides' claim for loss of consortium is derivative of her husband's claims against the defendants. Reagan v. Vaughn, 804 S.W. 2d 463, 467 (Tex. 1990), overruled in part, 34 Te Sup. J. 419 (1991). Because the district court properly granted summary judgment against Mr. Benavides, Mrs. Benavides' derivative claim for loss of

consortium is also barred. Reed Tool Co. V. Copelin, 610 S. W. 2d 736, 739 (Tex. 1980).

We also find that the district court properly granted summary judgment on Mrs. Benavides' claim for negligent infliction of emotional distress. Texas courts recognize such a cause of action. See Freeman v. City of Pasadena, 744 S.W. 2d 923, 924 (Tex. 1988); Landreth v. Reed, 570 S.W. 2d 486, 489 (Tex. Civ. App. - - Texarkana 1978). However, a plaintiff may not recover as a "bystander" for emotional distress caused by the death or physical injury of a loved one unless her emotional distress was reasonably foreseeable by the defendant. City of Austin v. Davis, 693 S.W. 2d 31, 33 (Tex. App. - - Austin 1985 writ ref. n.r.e.). In order to prove such reasonable forseeability, the plaintiff must prove, among other things, that her emotional

distress "resulted from a direct emotional impact...from the sensory and contemporaneous observance of the incident, as contrasted to learning of the accident from others after the occurrence." Reagan, 804 S.W. 2d at 467. If a plaintiff learns about the injury incurred by her loved one from an intermediary before she actually sees the injured person, she cannot recover under a "bystander" theory of liability. Hewitt v. Chadwick, 760 S.W. 2d 333, 334 (Tex. App. - - Texarkana 1988).

Mrs. Benavides saw her husband for the first time after his injuries when she went to the jail to pick her husband up on Sunday evening. When Mrs. Benavides arrived at the jail, she saw her husband being taken from the jail on a stretcher to a waiting ambulance. She contends that seeing her injured husband on the stretcher constitutes a

"contemporaneous observance" that could support a finding of bystander liability.

The undisputed facts indicate that Mrs. Benavides did not "experience the shock of unwittingly coming upon the accident scene." National County Mut. Fire Ins. Co. v. Howard, 749 S.W. 2d 618, 622 (Tex. App. - - Forth Worth, 1988). On Sunday morning, Mrs. Benavides came to pick her husband up. According to the Benavides' own brief on appeal, the jail staff informed her that "her husband would not get out of bed and complained of being paralyzed." Again, according to the Benavides' brief, Mrs. Benavides became "very upset and worried...after a jailer told her that her husband was acting paralyzed." She then left the jail without seeing her husband. Later on Sunday, Mrs. Benavides called a relative who

had visited her husband in jail. Mrs. Benavides testified in her deposition that "my husband told [the relative] that he was paralyzed and that he was not going to get out of there walking, that he had to go in an ambulance, a stretcher or in a wheelchair."

The undisputed facts indicate that Mrs. Benavides learned from others about her husband's injury before seeing him on the stretcher on Sunday evening. Therefore, the district court did not err in granting summary judgment to the defendants on Mrs. Benavides' claim for negligent infliction of emotional distress.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

APOLINAR "PAUL" BENAVIDES AND STELLA G. BENAVIDES	)	
PLAINTIFFS,	)	
VS.	)	CIVIL ACTION # SA-89-CA-1076
COUNTY OF WILSON AND MARVIN H. BAUMANN, SHERIFF OF WILSON COUNTY INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY	)	
DEFENDANTS	)	

J U D G M E N T

On this date came on to be considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order filed in this cause on this same date,

It is hereby ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for

Summary Judgment filed April 6, 1990, is GRANTED, and this cause is DISMISSED WITH PREJUDICE.

SIGNED and ENTERED this 1st day of February, 1991.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

APOLINAR "PAUL" BENAVIDES AND STELLA G. BENAVIDES PLAINTIFFS, VS. COUNTY OF WILSON AND MARVIN H. BAUMANN, SHERIFF OF WILSON COUNTY INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY DEFENDANTS	CIVIL ACTION # SA-89-CA-1076

O R D E R

On this date came on to be considered the Defendants' Motion for Summary Judgment, filed April 6, 1990.

Finding no genuine issue as to any material fact, the Court, at the pretrial conference on February 1, 1991, indicated that it would grant the motion for summary judgment

pursuant to Fed. R. Civ. P. 56(c). The Court stated orally and recorded its findings and conclusions of law despite the fact that Fed. R. Civ. P. 52(a) indicates that such findings are unnecessary for summary judgment motions.[1]

ACCORDINGLY, pursuant to the rulings in open court, it is hereby ORDERED that Defendants' Motion for Summary Judgment, filed April 6, 1990, is GRANTED as to all of Plaintiffs' claims, and this cause is DISMISSED.

SIGNED AND ENTERED this 1st day of February 1991.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

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[1]Fed. R. Civ P. 52(a) specifically states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under rules 12 or 56...." But see Heller v. Namer, 666 F. 2d 905, 911 (1982) (emphasizing the importance of a detailed discussion by the trial judge even though Rule 56 does not "technically require" a statement of reasons for granting summary judgment).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

APOLINAR BENAVIDES AND STELLA G. BENAVIDES,	) CIVIL ACTION
PLAINTIFF,	) SA-89-CA-1076
VS.	) SAN ANTONIO, TEXAS
COUNTY OF WILSON AND MARVIN	) FEBRUARY 1, 1991
BAUMANN, SHERIFF OF WILSON CO.,	) 8:55 A.M.
DEFENDANT	)

PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE EDWARD C. PRADO, JUDGE,
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT.

APPEARANCES FOR:

THE PLAINTIFF: MR. GEORGE MAUZE', III
111 SOLEDAD, SUITE 1220
SAN ANTONIO, TEXAS 78205

THE DEFENDANT: MR. FRED SHANNON, JR.
MR. MICH WEIDENBACH
112 E. PECAN ST.
SAN ANTONIO, TEXAS 78205

THE COURT RECORDER: MS. NANCY HERMER

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.

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PRE-TRIAL CONFERENCE: 3

(THE PROCEEDINGS COMMENCE AT 8:55 A.M.)

THE COURT: GOOD MORNING

SA-89-CA-1076, STYLED APOLINAR BENAVIDES AND STELLA G. BENAVIDES VERSUS COUNTY OF WILSON AND MARVIN H. BAUMANN, SHERIFF OF WILSON COUNTY.

IF I CAN HAVE THE ANNOUNCEMENT OF THE ATTORNEYS, PLEASE

MR. MAUZE: MAY IT PLEASE THE COURT.

I'M GEORGE MAUZE ON BEHALF OF THE PLAINTIFFS AND WE'RE READY TO PROCEED ON ALL THE PENDING MOTIONS EXCEPT THE FINAL MOTION FILED BY THE DEFENDANTS, THE MOTION FOR LEAVE TO SUPPLEMENT THEIR BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT.

MR. SHANNON: FRED SHANNON, YOUR HONOR, ON BEHALF OF DEFENDANTS, ALONG WITH MITCH WEIDENBACH, AND WE ARE READY, YOUR HONOR.

THE COURT: OKAY

I'M SORRY FOR THE SLIGHT DELAY THIS MORNING, BUT I WAS REVIEWING LAST MINUTE MATTERS WITH REGARD TO THE CASE, AND THE MOTIONS THAT WERE PENDING.

AND, I'M PREPARED TODAY TO RULE ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT THAT WAS FILED ON APRIL THE 6TH OF LAST YEAR.

AND, IN MAKING MY RULING I'VE REVIEWED THE PLAINTIFFS' OPPOSITION BRIEF, THE DEFENDANTS' REPLY BRIEF, BOTH THE SUPPLEMENTAL BRIEFS FILED BY THE PLAINTIFFS EARLIER THIS MONTH, ALL THE EXHIBITS AND THE FILE THAT THE COURT HAS IN THIS CASE.

I WILL FIRST ADDRESS THE STANDARD TO BE APPLIED IN DETERMINING WHETHER TO GRANT SUMMARY JUDGEMENT. FEDERAL CIVIL PROCEDURE 56 PROVIDES THAT SUMMARY JUDGMENT SHALL BE RENDERED IF THERE IS NO GENUINE ISSUE

AS TO ANY MATERIAL FACT. AND, THE MOVANT IS 6
ENTITLED TO JUDGEMENT AS A MATTER OF LAW.

DEFENDANTS, THOUGH MOVANTS FOR SUMMARY JUDGMENT, WILL NOT CARRY THE BURDEN OF PROOF AT TRIAL ON THE ISSUE BEFORE THE COURT.

UNDER RECENT SUPREME COURT AND FIFTH CIRCUIT LAW, THE MOVANT NEED ONLY PRESENT OR DESIGNATE EVIDENCE WHICH NEGATES OR DISPROVES THE EXISTENCE OF ANY ESSENTIAL ELEMENT OF THE OPPOSING PARTY'S CLAIM.

ONCE MOVANT HAS MADE THIS SHOWING, THE NON MOVANT MUST RESPOND WITH A SPECIFIC FACTUAL SHOWING THAT A GENUINE ISSUE IS IN DISPUTE.

IN ORDER TO SURVIVE A MOTION FOR SUMMARY JUDGEMENT, THE NON MOVANT MUST RAISE A GENUINE DISPUTE AS TO A MATERIAL FACT. GENUINE ISSUES OVER IRRELEVANT, IMMATERIAL OR UNNECESSARY FACTS WILL NOT RENDER SUMMARY JUDGEMENT INAPPROPRIATE.

I UNDERSTAND THE FACTUAL 7
BACKGROUND OF THIS CASE TO BE AS FOLLOWS:

LATE ON THE NIGHT OF APRIL THE 29TH OF 1989, APOLINAR AND STELLA BENAVIDES AND SOME FRIENDS HAD GONE TO TWO SEPARATE ICE HOUSES. MR. BENAVIDES BECAME INTOXICATED AND AT THE SECOND ICE HOUSE THREATENED A MAN WITH A KNIFE.

THE FLORESVILLE POLICE WERE SUMMONED AND MR. BENAVIDES WAS ARRESTED FOR PUBLIC INTOXICATION AND TAKEN TO THE WILSON COUNTY JAIL.

THE OFFICERS WHO WERE AT THE SCENE TESTIFIED, BY AFFIDAVIT, THAT MR. BENAVIDES WAS INTOXICATED AND BELLIGERENT, KICKING AT THE OFFICERS AND THEIR VEHICLES.

BECAUSE OF HIS CONTINUED BELLIGERENCE WHILE BEING BOOKED, MR. BENAVIDES WAS PLACED IN AN ISOLATION CELL BY THE JAILER, JOHN BLOCKER, AND ONE OF THE ARRESTING

OFFICERS. WHILE IN THE CELL, HE WAS HEARD SHOUTING AND OBSERVED BANGING ON THE DOOR, ALLEGEDLY WITH HIS HEAD AND SHOULDERS. 8

THE PLAINTIFFS AND DEFENDANTS DISAGREE ABOUT WHAT HAPPENED NEXT.

MR. BENAVIDES CLAIMS THAT MR. BLOCKER ENTERED THE CELL AND PUSHED OR HIT HIM IN SUCH A WAY THAT HE FELL TO THE FLOOR AND HIT THE BACK OF HIS HEAD.

MR. BLOCKER TESTIFIED THAT HE DID NOT ENTER THE CELL BUT TOLD MR. BENAVIDES TO BE QUIET.

IT IS UNDISPUTED THAT MR. BENAVIDES SUFFERED PERMANENT SPINAL CORD AND NECK INJURIES SOME TIME BETWEEN MIDNIGHT AND 1:00 A.M.

DURING THE NEXT DAY, MR. BENAVIDES CLAIMS HE ASKED FOR MEDICAL HELP AND REPEATEDLY TOLD THE JAIL OFFICERS ON DUTY THAT

HE COULD NOT MOVE. THE OFFICERS ON DUTY 9
CLAIMED THEY SAW HIM MOVE HIS HEAD AND ARMS.

WHILE MRS. BENAVIDES ARRIVED AT 7:00 P.M. TO GET HER HUSBAND, AND HE WAS UNABLE TO GET UP, THE E.M.S. UNIT WAS CALLED AND MR. BENAVIDES WAS TAKEN TO THE WILSON COUNTY HOSPITAL.

MR. BENAVIDES SUED WILSON COUNTY AND IT'S SHERIFF, MARVIN BAUMANN, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY, ALLEGING ASSAULT, NEGLIGENCE AND VIOLATION OF TITLE 14, UNITED STATES CODE, SECTION 1983.

MRS. BENAVIDES CLAIMS NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND LOSS OF CONSORTIUM.

THE COURT NOTES FOR THE RECORD THAT THE PLAINTIFFS ABANDONED THEIR CLAIM FOR ASSAULT AND NEGLIGENCE AT PAGE 30 OF THEIR OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY

JUDGEMENT FILED ON APRIL THE 23RD. THESE 10
CLAIMS ARE HEREBY DISMISSED FROM THIS CAUSE.

TURNING TO THE 1983 CLAIMS, PLAINTIFF ALLEGED THAT SHERIFF BAUMANN, AS CHIEF POLICY MAKER IN LAW ENFORCEMENT FOR WILSON COUNTY, VIOLATED MR. BENAVIDES' CIVIL RIGHTS BY HIRING UNFIT OFFICERS AND FAILING TO TRAIN, SUPERVISE, INVESTIGATE OR REPRIMAND THEM. THE ALLEGED UNDERLYING CONSTITUTIONAL VIOLATIONS OR JAILER BLOCKER'S USE OF EXCESSIVE FORCE AND HIS AND THE OFFICERS' FAILURE TO PROVIDE ADEQUATE MEDICAL CARE.

WE BEGIN WITH THE RULES THAT A MUNICIPALITY MAY BE HELD LIABLE FOR THE ILLEGAL OR UNCONSTITUTIONAL ACTIONS OF ITS POLICY MAKERS. AND THAT IN TEXAS, THE FINAL POLICY MAKER IN LAW ENFORCEMENT IN A COUNTY IS THE SHERIFF. THIS IS IN ACCORDANCE WITH THE TURNER VERSUS UPTON COUNTY CASE. TO BE LIABLE UNDER 1983, THE SHERIFF MUST EITHER BE

PERSONALLY INVOLVED IN THE ACTS THAT CAUSED 11
THE DEPRIVATION OF CIVIL RIGHTS, OR SOME CAUSAL CONNECTION MUST EXIST BETWEEN AN ACT OF THE SHERIFF AND A CONSTITUTIONAL VIOLATION.

AS IT IS UNDISPUTED THAT SHERIFF BAUMANN DID NOT PERSONALLY PARTICIPATE IN ANY ALLEGED ASSAULT ON MR. BENAVIDES, THE ACT CAUSING THE CONSTITUTIONAL DEPRIVATION IS THE ALLEGED FAILURE OF SHERIFF BAUMANN TO ADEQUATELY TRAIN AND SUPERVISE HIS EMPLOYEES.

NEITHER THE SHERIFF NOR THE COUNTY CAN BE HELD LIABLE SOLELY BECAUSE IT EMPLOYED A TORT-FEASOR. THAT IS, NEITHER CAN BE HELD LIABLE ON THE BASIS OF RESPONDENT SUPERIOR.

THIS IS IN ACCORDANCE WITH THE MONNELL(sp) VERSUS DEPARTMENT OF SOCIAL SERVICES CASE. MUNICIPAL LIABILITY MUST BE PREMISED ON A POLICY OR CUSTOM WHICH CAUSES, OR OCCASIONS A CONSTITUTIONAL DEPRIVATION.

THE SUPREME COURT HAS RECENTLY 12
ADDRESSED THE STANDARD BY WHICH ALLEGATIONS OF FAILURE TO TRAIN AND SUPERVISE ARE TO BE MEASURED UNDER 1983.

IN THE CITY OF CANNON, OHIO VERSUS HARRIS, THE SUPREME COURT HELD THAT INADEQUATE TRAINING MAY SERVE AS A BASIS FOR A 1983 LIABILITY ONLY WHEN THE FAILURE TO TRAIN AMOUNTS TO DELIBERATE INDIFFERENCE, TO THE RIGHTS OF PERSONS WITH WHOM THE OFFICERS COME INTO CONTACT. THE FAILURE TO TRAIN MUST REFLECT A DELIBERATE, THAT IS, CONSCIOUS CHOICE BY THE POLICY MAKER.

THE COURT ALSO STATED, AND I QUOTE, "THAT A PARTICULAR OFFICER MAY BE UNSATISFACTORILY TRAINED - - THAT A PARTICULAR OFFICER MAY BE UNSATISFACTORILY TRAINED WILL NOT ALONE SUFFICE TO FASTEN LIABILITY ON THE CITY. NEITHER, WILL IT SUFFICE TO PROVE THAT AN INJURY OR ACCIDENT COULD HAVE BEEN AVOIDED

IF AN OFFICER HAD HAD BETTER OR MORE TRAINING 13
SUFFICIENT TO HAVE EQUIPPED HIM TO AVOID THE PARTICULAR INJURY CAUSING CONDUCT. MOREOVER, THE IDENTIFIED DEFICIENCY IN A CITY'S TRAINING PROGRAM MUST BE CLOSELY RELATED TO THE ULTIMATE INJURY." UNQUOTE.

THE FIFTH CIRCUIT HAS ESTABLISHED THE OFFICIAL POLICY, IS EITHER A POLICY STATEMENT, ORDINANCE, REGULATION, ET CETERA, THAT IS OFFICIALLY ADOPTED BY THE POLICY MAKERS OR A PERSISTENT WIDESPREAD PRACTICE OF OFFICERS OR EMPLOYEES, WHICH, ALTHOUGH NOT AUTHORIZED BY OFFICIALLY ADOPTED POLICY, IS SO COMMON AND WELL SETTLED AS TO CONSTITUTE A CUSTOM THAT FAIRLY REPRESENTS MUNICIPAL POLICY. THIS IS IN ACCORDANCE WITH THE PALMER VERSUS CITY OF SAN ANTONIO CASE. ALTHOUGH A SINGLE POLICY DECISION BY POLICY MAKERS MAY RESULT IN LIABILITY, A SINGLE INCIDENT OF UNCONSTITUTIONAL CONDUCT ALONE IS

NOT SUFFICIENT TO SHOW THAT A POLICY OR CUSTOM 14
EXISTS.

THIS IS IN ACCORDANCE WITH THE CITY OF OKLAHOMA VERSUS TUTTLE. RESOLVING ALL DOUBTS IN FAVOR OF PLAINTIFF AS NON MOVANTS AND ACCEPTING PLAINTIFFS' VERSION OF THE FACTS AS TRUE, PLAINTIFFS HAVE FAILED TO ADDUCE ANY EVIDENCE OF A POLICY OR CUSTOM THAT RESULTED IN THE VIOLATION OF MR. BENAVIDES' CIVIL RIGHTS.

IT IS UNDISPUTED THAT NONE OF THE OFFICERS HAS HAD ANY OTHER CLAIMS OF EXCESSIVE FORCE OR COMPLAINTS OF ABUSE BY PRISONERS FILED AGAINST HIM.

IT IS ALSO UNDISPUTED THAT SHERIFF BAUMANN'S HIRING POLICIES CONSISTED OF CHECKING APPLICANTS' CRIMINAL, SOCIAL, CREDIT AND EMPLOYMENT HISTORY. AND, THAT APPLICANTS HAD TO MEET STATE QUALIFICATIONS AND BE STATE CERTIFIED IN SPECIFIC AREAS OF

LAW ENFORCEMENT, WHICH INCLUDED PSYCHOLOGICAL AND PHYSICAL EVALUATIONS. 15

IT IS ALSO UNDISPUTED THAT SHERIFF BAUMANN CONDUCTED HIS OWN INVESTIGATION AND OBTAINED AN INDEPENDENT INVESTIGATION OF THE INCIDENT BY THE TEXAS RANGERS.

PLAINTIFFS' SOLE EVIDENCE OF ALLEGED DEFICIENCIES IN HIRING AND SUPERVISING IS FOUR PAGES OF DEPOSITION TESTIMONY FROM OFFICER JOHN SEXTON.

PLAINTIFFS IDENTIFY MR. SEXTON AS AN EXPERT, ALTHOUGH, HIS QUALIFICATIONS HAVE NOT BEEN PRESENTED TO THE COURT, AND HIS CONCLUSIONS ARE NOT SUPPORTED BY ANY REASONING OR FACTUAL SUPPORT IN THE EXCERPTS PROVIDED TO THE COURT.

MR. SEXTON STATES THAT WILSON COUNTY FAILED TO HIRE, SCREEN, TRAIN, INVESTIGATE AND SUPERVISE ITS OFFICERS AND

JAILERS IN ACCORDANCE WITH ACCEPTABLE STATE AND NATIONAL STANDARDS, BUT DOES NOT ELABORATE ON THOSE STANDARDS, OR, ON HOW THE POLICIES IN PLACE BY THE SHERIFF DID NOT MEET THOSE STANDARDS. 16

THE COURT FINDS THAT THESE EXCERPTS FROM TESTIMONY ARE INSUFFICIENT TO RAISE A FACT ISSUE AS TO AN EXISTENCE OF AN UNCONSTITUTIONAL POLICY OR CUSTOM, ESPECIALLY WHERE NO OTHER DETAINEES HAVE COMPLAINED OF SIMILAR ABUSE.

AS THE FIFTH CIRCUIT STATED IN STOKES V. BULLINS, "AN EXPERT'S OPINION SHOULD NOT BE ALONE SUFFICIENT TO ESTABLISH CONSTITUTIONAL FAULT BY A MUNICIPALITY IN A CASE OF ALLEGED OMISSIONS WHERE NO FACTS SUPPORT THE INFERENCE THAT THE POLICY MAKER'S MOTIVES WERE CONTRARY TO CONSTITUTIONAL STANDARDS." THUS, LEFT WITH A SINGLE TRAGIC INCIDENT AND NO EVIDENCE OF A POLICY OR CUSTOM

OF DELIBERATE INDIFFERENCE TOWARDS THE 17
CONSTITUTIONAL RIGHTS OF OTHERS IN THE HIRING, TRAINING OR SUPERVISING OF JAIL EMPLOYEES BY SHERIFF BAUMANN.

ALTHOUGH, THERE MAY BE DISAGREEMENT ABOUT WHAT HAPPENED IN THE JAIL THAT NIGHT, THE JAILERS ARE NOT BEFORE THE COURT AS DEFENDANTS.

AND WITHOUT A SHOWING OF POLICY OR CUSTOM, AS A MATTER OF LAW, DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AGAINST MR. BENAVIDES' CLAIMS.

DEFENDANTS ARE ALSO ENTITLED TO SUMMARY JUDGMENT ON MRS. BENAVIDES' CLAIMS OF EMOTIONAL DISTRESS AND LOSS OF CONSORTIUM.

LOSS OF CONSORTIUM IS A DERIVATIVE CLAIM AND LIABILITY TO THE CONSORTIUM CLAIMANTS SPOUSE IS A PREREQUISITE. BECAUSE, THE DEFENDANTS HAVE BEEN GRANTED SUMMARY JUDGMENT ON MR. BENAVIDES' CLAIMS MRS.

BENAVIDES', LIKEWISE, CANNOT RECOVER FOR HER 18
LOSSES OCCASIONED BY HIS INJURIES.

MRS. BENAVIDES ALSO CLAIMS SHE SUFFERED EMOTIONAL DISTRESS AS A RESULT OF BEING AWARE THAT HER HUSBAND WAS IN JAIL AND CLAIMING HE COULD NOT MOVE. AND BEING SHOCKED WHEN HE WAS CARRIED OUT FROM THE JAIL.

A BYSTANDER CAN RECOVER FOR EMOTIONAL DISTRESS IN TEXAS, ONLY IF THE BYSTANDER CONTEMPORANEOUSLY PERCEIVES THE ACCIDENT AS CONTRASTED WITH LEARNING OF THE ACCIDENT FROM OTHERS AFTER ITS OCCURRENCE.

IT IS UNDISPUTED THAT MRS. BENAVIDES DID NOT WITNESS THE INJURY WHEN IT OCCURRED AND WAS INFORMED MORE THAN ONCE DURING THE DAY THAT HER HUSBAND CLAIMED HE COULD NOT MOVE BEFORE SHE CAME TO GET HIM FROM THE JAIL AT 7:00 P.M.

FURTHER, THIS CLAIM AS IT TOO IS BROUGHT AGAINST THE SHERIFF AND COUNTY MUST

BE GROUNDED IN SOME CUSTOM OR POLICY THAT 19
RESULTED IN THE INJURY. NO SUCH ALLEGATION ARE MADE HERE, OTHER THAN THOSE DISPOSED OF IN ADDRESSING MR. BENAVIDES' CLAIMS.

ACCORDINGLY, IT IS HEREBY ORDERED THAT THE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT IS GRANTED AND THE COURT WILL DISMISS THIS CAUSE OF ACTION.

I'LL COME OUT WITH A SHORT ORDER THAT SAYS: PURSUANT TO MY FINDINGS ON THE RECORD THAT THE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT WILL BE GRANTED AND THAT THE CASE IS DISMISSED.

ANYTHING FURTHER?

MR. SHANNON: NO, YOUR HONOR. THANK YOU.

MR. MAUZE: YOUR HONOR, FOR THE RECORD I'D LIKE TO REITERATE MY ANNOUNCEMENT OF NOT READY ON THEIR MOTION FOR LEAVE TO SUPPLEMENT THEIR BRIEF.

I CONSIDER THEIR SUPPLEMENTAL 20
BRIEF MORE OF AN AMENDED BRIEF. AND, WE HAVE TEN DAYS UNDER THE RULES TO RESPOND TO THEIR MOTION FOR LEAVE. OUR TEN DAYS HAVE NOT EXPIRED. PLUS, WE HAVE TWENTY DAYS WE'RE ENTITLED TO ON NOTICE OF A MOTION FOR SUMMARY JUDGEMENT, WHICH WE HAVE NOT BEEN GIVEN.

SO I'D JUST LIKE TO STATE, ON THE RECORD, WE DO REPEAT OUR OBJECTION TO THE COURT CONSIDERING THEIR MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF. AND, WE DO OBJECT TO THE COURT CONSIDERING THEIR SUPPLEMENTAL BRIEF.

THE COURT: OKAY

IS THAT THE MATTER THAT WAS FILED TODAY?

MR. MAUZE: IT WAS FILED ABOUT A WEEK AGO, YOUR HONOR.

THE COURT: A WEEK AGO.

MR. MAUZE: ON THE 23RD OF JANUARY.

THE COURT OKAY

OKAY, COURT WILL BE IN RECESS.

(THE COURT IS CONCLUDED AT 9:15 A.M.)

TRANSCRIBED BY: JACK SAMPLE

I, BARBARA J. DRENNAN, AUTHORIZED 22
ELECTRONIC RECORDING TRANSCRIBER, DO HEREBY CERTIFY THAT I HAVE TRANSCRIBED THE ABOVE PROCEEDINGS FROM CERTIFIED TAPES TAKEN BY THE COURT IN THE ABOVE STYLED AND NUMBERED CAUSE ON FEBRUARY 1, 1991; THAT SAID PROCEEDINGS WERE REDUCED TO TYPEWRITING BY ME OR UNDER MY PERSONAL SUPERVISION, AND THE ABOVE AND FOREGOING 13 PAGES OF TYPEWRITING CONSTITUTE A TRUE AND CORRECT TRANSCRIPT THEREOF.

GIVEN UNDER MY AUTHORIZED HAND, THIS THE 26TH DAY OF FEBRUARY, A.D., 1991.

BARBARA J. DRENNAN
AUTHORIZED ELECTRONIC
RECORDING TRANSCRIBER

U.S. CONSTITUTION

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted.

U.S. CONST. AMEND. XIV, section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254(1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal

matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and

disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.